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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1025

JOSEPH NAPLES,
Petitioner,

vs.

E. L. MAXWELL,
Warden of Ohio Penitentiary,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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Comes now Joseph Naples, petitioner, and respectfully prays this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on November 4, 1966, reversing an order of the United States District Court for the Southern District of Ohio, Eastern Division, in favor of petitioner.

OPINION BELOW.

The opinion and order of the District Court, entered herein on August 24, 1965, is unreported and is found at R. 264a-271a of the transcript filed herewith. The opinion of the United States Court of Appeals for the Sixth Circuit is unreported, and is found in the appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals were entered on November 4, 1966; petition for rehearing was not filed due to the tenor of the Court's opinion. Mandate has been stayed pending the filing of this appeal.

The jurisdiction of this Honorable Court is invoked under 28 U. S. C. A. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where an attorney of record, in good faith, made recommendations to the trial court, after pleadings, evidence and arguments have been submitted and the court ordered the conditional release of habeas corpus petitioner and where that court denied relief under Rule 60(b)(1) FRCP on the grounds that movant failed to meet the degree of proof required, should the Court of Appeals, using the same degree of proof, reverse by applying Rule 60(b)(6) FRCP.

2. Whether a Court of Appeals should substitute its discretion for that of the trial court in determination of issues of fact.

3. Whether an attorney of record is presumed to have authority to act and what degree of proof is required to overcome that presumption.

STATUTES AND RULES INVOLVED.

The relevant statutes and rules are set forth in the appendix hereto at pp. 23-26, as follows: Ohio Revised Code Sections 1901.02, 2933.26 and 2933.28; Federal Rules of Civil Procedure, Rule 60(b); 28 U. S. C. A. Sections 2241, 2254 and 2111.

STATEMENT OF THE CASE.

Two cases presenting the same questions were consolidated in the District Court for disposition by means of a writ of Habeas Corpus. (Sections 2241(a)(c)(3) and 2254, Title 28, U. S. C.)

Petitioner was indicted in three cases by the Grand Jury of Mahoning County, Ohio. The cases were numbered 21744, 21745 and 21746 on the docket of the Common Pleas Court. (R. 86a, 87a.) Three separate trials were held. Petitioner was acquitted in case No. 21745; he was found guilty in cases 21744 and 21746.

After Petitioner's arrest the case was continued at the request of the State to afford time to file written motions and briefs on the question of illegal search and seizure, briefs on that question having been ordered by the Court (R. 89a, 90a). Petitioner's counsel filed motions and briefs pursuant with the Court's order (in writing) (R. 90a); thereafter counsel was told by the Chief of Police of Youngstown, Ohio, that if counsel did not "quit" trying to investigate this case, if he didn't leave it just where it was, that he (the Chief of Police) was going to pick up all the evidence against Petitioner and take it directly to the grand jury (R. 91a). Counsel then motioned the Municipal Court to bar the Chief of Police from taking such action (R. 91a) until such time as the motion to suppress evidence could be heard (R. 91a) pursuant with Ohio Revised Code Section 2933.26 (R. 98a, 99a) (Appendix p. 23, *infra*) and the Municipal Court was asked to set a date for preliminary hearing as soon as possible (R. 100a). Somehow the property was taken out of the jurisdiction of the Municipal Court and taken to the Grand Jury of Mahoning County, Ohio (R. 104a). Petitioner was then secretly indicted.

Petitioner was never heard on the question of suppression of evidence until he filed his writ of habeas corpus in the United States District Court.[1]

The petition for writ of habeas corpus was filed in the United States District Court, Southern District of Ohio, on July 2, 1964, *wherein Petitioner, having exhausted all his remedies* in the State of Ohio (emphasis added), alleged that he had been *denied his constitutional right to due process of law* for the reason *that he was convicted on the basis of evidence obtained pursuant to a search warrant issued without sufficient legal probable cause* (emphasis added). Petitioner contended further in his petition that he was imprisoned in derogation of and in violation of his *lawful and constitutional* rights and further, deprived of liberty *without due process;* that illegally obtained evidence taken from the home owned by his aged parents was unlawfully admitted against him and that he was *never* given a full, fair fact-finding hearing on his pleas for relief in the State Courts (R. 7a, 8a). Petitioner prayed that a writ of habeas corpus issue; that he be placed in the temporary custody of the United States Marshal, and be admitted to bail pending final hearing upon the merits. Appropriate appendices of record were annexed to the petition (R. 30a through 44a).

On or about July 20, 1964 Respondent filed a brief, "contra. motion for bail," by John Cianflona, then Assistant Attorney General, and stated, "A cursory glance at Petitioner's application for writ of habeas corpus clearly

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[1]*Townsend v. Sain,* 372 U. S. 293, was urged upon the district court as controlling. The testing of the potential violation of constitutional rights by way of evidentiary hearing to ascertain the facts which are a necessary predicate to a decision of the ultimate constitutional question. *Townsend* held it is mandatory to hold an evidentiary hearing where the facts are in dispute on whether or not the petitioner had a *full* and *fair* hearing at the *state court level.*

reflects that detailed questions of law and facts are the crux of this case * * *" (R. 46a). Petitioner replied to Respondent's brief (R. 48a thru 58a) and clearly indicated that Petitioner was entitled to the relief sought on the record alone (R. 50a, 51a, 52a and 53a).

Prior to the time the return was filed by Respondent, to-wit: August 12, 1964, proceedings were had before the District Trial Court wherein *Mr. Leo Conway represented the Respondent;* the primary purpose of the proceedings being admission to bail (R. 60a) and although the return was not yet filed, Petitioner was physically present in court. Counsel for Petitioner then furthered his effort to be heard on the writ (R. 61a, 62a, 63a and 64a) and *Mr. Conway* stated that the matter of preliminary hearing was *new matter to him.* (R. 66a.) Mr. Conway conceded that the trial court's power to admit to bail was discretionary (R. 67a) and then turned his attention to the case of *Texas v. Aguilar*[2] (R. 67a) the case on which Petitioner relied for the showing that the warrant to search in the case at bar was not based on legally sufficient probable cause; that the evidence seized was illegally seized and should have been suppressed by the Municipal Court, the Common Pleas Court or the Courts of Appeal (R. 51a, 52a, 53a, Petitioner's brief). Mr. Conway indicated he was very familiar with the *Aguilar* case (R. 69a) and he *admitted* that the affidavits to search in *Aguilar* and *Naples* (instant case) were *"strikingly similar"* (R. 69a). Then finally Mr. Con-

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[2] *Texas v. Aguilar,* 378 U. S. 108 (1964), had just been decided by the Supreme Court. In *Aguilar* the supporting affidavit for the warrant to search showed the "suspicion" and "belief" or "mere conclusion" by the police officer was not that of the police officer himself; it was that of an unidentified informant. The facts in Naples (the instant case) went one step further: the suspicion, belief and conclusion was not that of the affiant, but of a superior, who in turn was alleged to have received information from an unidentified informant. (See R. 39a-41a, the trial testimony of affiant G. Brace, detective, in the instant case.)

way admitted that the officer who signed the affidavit in the case at bar *did not have personal knowledge of the facts* contained in the affidavit (R. 71a). Mr. Conway then admits that lack of personal knowledge of matters contained in the affidavit was ruled in *Aguilar as fatal on the constitutional question* (R. 72a) and finally the colloquy with the court was resolved with the observation that it is "the best I can do under those circumstances" (R. 74a). The trial court then took the matter under advisement (R. 79a). The Respondent made his return of the writ on October 27, 1964, and denied generally the petition for habeas corpus but admitted the following (R. 81a):

1. That Petitioner was in Respondent's custody;

2. That the Petitioner was convicted of promoting a numbers game and receiving stolen property;

3. That Petitioner had exhausted his State remedies;

4. That Petitioner's contention is that he was convicted as a result of introduction of evidence which was acquired through a search warrant which was not based upon legally sufficient probable cause.

An evidentiary hearing was allowed in the District Court on the day the return was made, to-wit: October 27, 1964, and Petitioner, in addition to his original brief, exhibits,[3] and pleadings, offered testimony (R. 88a-105a) by the former trial counsel of Petitioner who testified on direct and cross-examination that he was Petitioner's former

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[3] Detective G. Brace, who signed the affidavit under oath, testified at the original trial; his testimony under cross examination was one of the exhibits annexed to the petition for habeas corpus. He testified on how the warrant to search was obtained (R. 38a-41a). Petitioner argued then as he insists now that the testimony of Brace brings *State v. Naples* and *Texas v. Aguilar*, as almost identical on the question of legally sufficient probable cause.

counsel (R. 89a); he identified exhibits offered to the District Court (R. 89a, 90a) and the Court later admitted such exhibits into evidence (R. 97a thru 100a). The witness testified further of threats made by the Chief of Police at Youngstown, Ohio, if the witness continued to insist on Petitioner's rights (R. 91a); that hearings were never held although insisted upon (R. 92a), and that counsel for the State never bothered to answer or appear (R. 93a). On cross-examination the witness went on to testify that all the above took place during the months of August through October of 1962 (R. 93a); that he never had a preliminary hearing (R. 93a); that the usual custom in that court was to grant the preliminary hearing (R. 94a); that a preliminary hearing was requested, and motions were filed to suppress the evidence and he "pushed" the prosecutor to file his answer briefs (R. 94a) and he "suddenly heard" of Petitioner's indictment by the Grand Jury (R. 95a) and that the personal property which was subject of the motions and search warrant was no longer in the control of the Municipal Court of Youngstown (R. 95a). The witness further testified that the search warrant was not to be found and "nobody knew where it was"; that it had "disappeared from the record" (R. 95a). He testified further that after the indictment, the prosecutor's office wanted to dismiss the cases in Municipal Court and he opposed it. Having observed the Judge's intent to dismiss regardless of counsel's pleas, the witness filed written motions under Ohio Revised Code Section 2933.28, statutes of Ohio pertaining to the disposition of seized properties (R. 96a, 97a) and a motion to be heard (R. 97a) on Suppression of Evidence and Return of Seized Property. No hearings were granted (R. 7a). The witness goes on to say that his motion showed where the prosecutor "inquired of the defendant if he had an intention to contest a

search warrant issued by this Court and *made an integral part of this matter*" (R. 100a). "Upon finding that defendant did intend to contest said warrant," the prosecutor requested that (the Municipal Court) continue the preliminary hearing "until defendant filed his Brief and Memorandum," and "until the prosecution filed opposing Brief and Memorandum." The witness testified that his motion further stated, "As of this date, well *past* rule day, [the] prosecution has failed to file any motion, brief or memorandum *opposing* motion of the defendant" (R. 100a). The witness goes on to describe the atmosphere just prior to trial in the case at bar while before the Common Pleas Court. "We would file the motions and briefs." "The prosecutor would never answer them." "In the one case * * * I had filed a motion to suppress, so he (the trial judge) asked me to find it for him in the file, which I did, and as I recall, it was about a four-page motion and he looked through it real fast and he said, 'Oh, yes, that's a lot of nonsense, overruled.' " (R. 101a.) "In the next case I insisted the motion be heard and he made us find the motion for him and when the motion was found the Judge said, 'Is that the motion to suppress * * *. Is it the same one you filed in the other case?' " (R. 101a.) Mr. O'Neill replied, "There is new and additional law in it." "Well" (said the trial judge), "that's overruled too" (R. 102a). The witness goes on to testify that the treatment of the matter of motions to suppress evidence was "very arbitrary" (R. 102a). Then during colloquy with the District Judge:

> The Court: "Now at the request of the Court a transcript in one of these cases was made a part of the record in this case * * * and it was furnished through counsel. That's the defendant's Bill of Exceptions, Case number (21)21746, State of Ohio vs. Joseph Naples. Is there any objection, Mr. Cianflona,

to this being made a part of the record in this case?" (R. 106a.)

Mr. Cianflona: "No objections." (R. 106a.)[4]

The Court then inquired as to whether this was contended to be the same situation in the other case and it was stated by counsel that it was and that the court "can use this record (transcript of case number 21746)" and "assume that it truly depicts" what took place in both cases (R. 107a). During further colloquy with the District Court (R. 110a) the question was raised as to whether Petitioner gave *consent to search* and thereby waive his constitutional rights (R. 110a). The District Judge then ordered both sides to present briefs on the matter. He then stated, "The matter will be considered as submitted on the filing of the memorandums" (R. 111a).

Petitioner's "memorandum" was duly filed (R. 112a through 130a) with appendix.[5] The question of consent to search (R. 117a through 120a) and how Petitioner's constitutional rights had been affected were discussed at length and how the failure to hold hearings at the magistrate level on the question of illegal search affected his substantial rights; further, Petitioner showed where the basic error at bar "lies in the *denial of due process;* failure to grant a hearing in Municipal Court, the *unlawful removal of property* from the jurisdiction of that court *and failure to grant a fair hearing in Common Pleas* (R. 121a).

Respondent filed a memorandum as ordered by the District Court and centered on the question of *lack* of a

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[4] The testimony by former counsel, offered at the evidentiary hearing (R. 88a-111a), was left uncontradicted. It should be noted further that respondent left all the evidence presented by petitioner uncontradicted.

[5] Reference is made to Record, page 116a, to correct error in printing at:

1. "That at the time * * * that petitioner was 'not' there * * *" instead of "*out there.*"

preliminary hearing in Municipal Court and the question of consent to search (R. 131a-135a).

At a hearing held before the District Court on December 22, 1964, the following transpired:

"The Court: In the matter of the application of Joseph Naples for petition for writ of habeas corpus, No. 7157. At the previous hearing the Court advised counsel if you had anything further to offer you would be afforded the opportunity of doing so, and that is the reason for the hearing this morning.

"Are you ready to proceed?

"Mr. Duffy: We are ready, if Your Honor please.

"The Court: You may enter your appearances.

* * * * *

"The Court: The Court will hear you, Mr. Cianflona.

"Mr. Cianflona: If the Court please, after the last hearing in which one of the former attorneys who defended this case in Youngstown and the testimony was taken, we submitted briefs as best we could at the Court's request. The briefs are before the Court. I feel that in the interest of justice this man was deprived of his constitutional right in that due process was not properly had in the courts at Youngstown, Ohio, and that in view of that circumstance I can't see but what the Court would have to grant the writ under the circumstances, if that is the Court's intentions. I don't know.

"The Court: If I understand you correctly, Mr. Cianflona, you are recommending to this Court that the writ be granted due to the fact that due process was not followed by the courts?

"Mr. Cianflona: And in the interest of justice.

"The Court: And for that reason the Attorney General of Ohio is recommending that the writ be issued.

"Mr. Cianflona: That the case be remanded to the Municipal Court at Youngstown in accordance with the prayer of the petition." (R. 136a-137a.)

On December 23, 1964, the District Court entered an order releasing petitioner from custody and remanding him to the Common Pleas Court of Mahoning County, Ohio, for further proceedings and set bond in the amount of ten thousand dollars ($10,000) conditioned upon appellee's appearance before the Common Pleas Court of Mahoning County, Ohio, and further ordered that if no action be taken by the State of Ohio within sixty days after the filing of the order, appellee's release would be final (R. 140a-141a.)

On December 28, 1964, respondent moved the District Court to set aside and strike from the record the above mentioned order on the basis of Rule 60 (b) (1) Federal Rules of Civil Procedure. (28 USCA Rule 60(b)(1).)

At or about this time, the Attorney General of Ohio, William B. Saxbe, discharged Mr. Cianflona from his employ as an Assistant Attorney General of Ohio for the reason that Mr. Cianflona was without authority to make the statements as set forth in the transcript of the hearing held on December 22, 1964. (R. 136a-139a.)

After submitting memoranda in support of their motions, a hearing thereon was held on April 15, 1965, wherein there appeared as witnesses for respondent, William B. Saxbe, Attorney General of the State of Ohio and the former Assistant Attorney General of the State of Ohio, Mr. John Cianflona. (R. 184a-240a.)

On August 24, 1965 the District Court entered its order (R. 264a-283a) denying respondent's motion to set aside the District Court's order of December 23, 1964, and appellant's motion for findings of fact and conclusions of law made to the court at the last hearing. Respondent

filed his notice of appeal on September 2, 1965. On September 3, 1965, the Honorable Lester L. Cecil, Senior Circuit Judge, stayed the order of the District Court of December 23, 1964, pending disposition on appeal herein by the United States Court of Appeals, Sixth Circuit or the Supreme Court of the United States. (R. 4a.)

The cause came on to be heard before the United States Court of Appeals for the Sixth Circuit and the Court, upon consideration, ordered that the order of the District Court in this cause be vacated and set aside and the case remanded for further proceedings in conformity with the Court's opinion. (Appendix pp. 20 thru 23, *infra.*)

The Court of Appeals reasoned that the District Judge was in error in denying the motion to vacate the order granting the petition for a writ of Habeas Corpus. The Court stated further that due to "neglect" of counsel and "in the interests of justice" under Rule 60(b)(6) of Federal Rules of Civil Procedure, the order of August 24, 1965, denying the motion to vacate the order of December 23, 1964, should be reversed and remanded.

REASON FOR GRANTING THE WRIT.

In holding that E. L. Maxwell, Warden of Ohio Penitentiary, has a right to further determination on the original writ of Habeas Corpus, the Sixth Circuit has created an entirely new and novel remedy in Federal Jurisprudence. The holding is not conciliable with existing rules of law and decisions concerning the same matters. The appearance in Court of the attorney-at-law licensed to practice therein is prima facie evidence that the attorney is duly authorized to represent and act for the client, and, this presumption is said to be conclusive in the absence of countervailing evidence. *Communist Party of U. S. v. C. I. R.*, 332 F. 2d 325 (C. A. D. C. 1964); *Abraham vs. Shinberg*, 190 F. 2d 595 (C. A. D. C. 1959). This case followed an unbroken line of authority on that subject from 1940. *In re Pearl Coal Company*, 115 F. 2d 158 (D. C. 1940). It is here urged that the District Court in the instant case was entitled to remain assured that counsel appearing before the Court was clothed with the usual authority of such a licensed attorney. The District Court had so observed in holding:

> "Authority of an attorney to consent to a judgment is presumed in the absence of affirmative evidence to the contrary." (R. 269a.)

The apparent conflict created by the decision in overlooking the attorney's authority to act gave rise to the main conflict wherein the Court held that the decision must rest on Rule 60(b)(6) instead of Rule 60(b)(1) as originally pleaded by Respondent. The Court departed from the reasoning urged by Respondent concerning the "excusable neglect" theory obviously covered by existing Court decisions, *Ledwith vs. Storkan*, 2 F. R. D. 539 (D. C. Nebraska 1942) and chose to rely instead on Rule

60(b)(6) of the Federal Rules of Civil Procedure thus finding "plain error" in a fact situation which did not bring plain error into focus.

Motions for relief employing Rule 60(b) are usually directed to an attack on a judgment or order resulting from default. The usual application of the rule is met by Courts with language such as "loathe to overturn" unless relief is "compelled" or "unusual and/or exceptional" circumstances are found. *Marquette vs. Priester,* 234 F. S. 799 (D. C. S. C. 1964); if such is found then a liberal construction of the rule should be employed. *Hulson vs. Atchison, T. & S. F. Ry. Co.,* 289 F. 2d 726 (C. A. 7 1962, *certiorari denied* 82 S. Ct. 61, 368 U. S. 835, 7 L. ed. 2d 36). Even so the motion is directed to the sound discretion of the trial court and the trial court's determination should not be disturbed unless for abuse of discretion. *DeVito vs. Fidelity Insurance,* 361 F. 2d 936 (C. A. 7 1966). (To the same effect on the "excusable neglect" theory is *West vs. Gilbert,* 361 F. 2d 314 (C. A. N. Y. 1966).)

The trial court has full authority to vacate under 60(b)(6) and there would not be an abuse of discretion in vacating a dismissal order where there appears some indication that there may be some "substantial" chance of success on the merits. *Cavalliotis vs. Salomon,* 357 F. 2d 157 (C. A. N. Y. 1966).[6]

In the instant case there was never an allegation of fraud, inadvertence, mistake or other unavoidable circumstances. The only allegation was of excusable neglect. The Court below bypassed the theory proposed by respondent and while the Court did not cite precedent it seemed to attempt to follow the theory that Rule 60(b)(6) gives the

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[6] In the instant case, respondent had his "day in court." Unlike the "default" cases where the moving party in most instances did not have his day in court.

Court of Appeals power to vacate judgments and/or orders whenever such action is appropriate to accomplish justice. However, the necessary ingredients are not found in the instant case.[7]

We are confronted here with a broadening of the existing decisions on the question of the "power" of the Court to act as against the question of whether or not the facts give rise to the use of that power.[8]

The testimony in the instant matter involving the employment of Rule 60(b) (R. 184a-240a) controls the question and the matter of application of the "power" of the Court. Here the petitioner pleaded for a writ of Habeas Corpus. Pleadings, briefs, evidence and arguments were presented to the trial court. The attorney representing respondent on the final hearing date recommended that the writ issue. The trial court ordered the writ of Habeas Corpus to issue with a mandate for further proceedings in the State Court. Respondent, apparently not satisfied with the performance of the attorney who appeared, employed other counsel who motioned the Court to grant relief by way of Rule 60(b)(1); however, at no time did new counsel allege or prove that:

(1) the matter was unusual or exceptional;

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[7] Section 2111 U. S. C. Title 28; cf. *Helms vs. U. S.* (340 F. 2d 15; cert. denied 86 S. Ct. 33, 382 U. S. 814).

[8] *Segal v. Cook*, 329 F. 2d 278 (CA 6 1964). The Court of Appeals "concluded" that there was "neglect of duty" here and that the district judge was in "error." Hence the court is saying the district court should have made use of its power. This calls for the application of an allowable discretion in circumstances where discretion is not called for. *Ledwith v. Storkan*, 2 F. R. D. 539 (DC Neb. 1942) is a good example of the theory we propose viz. that unless there is fraud and overreaching, the district court cannot grant relief by arbitrary decision; nor is the movant's right to have the judgment set aside an absolute one unless there be an adequate showing; the burden is upon movant.

(2) what excusable neglect existed, if any;

(3) that the result of vacating the order of the Court would have a substantial or meritorious chance of success for a different result.

Hence, the decision of the Sixth Circuit leaves open a door that should be closed.[9] If a client is not satisfied with the performance of an attorney authorized to appear on his behalf, he simply employs another attorney who *alleges* that the former attorney did not have authority to act and, although he does not prove his contention, the matter may be resolved by granting the motion via the "power" granted by 60(b)(6).

The scope of appeal of an order denying motion under 60(b) is such that it brings to the attention of the Court of Appeals only the denial of the motion and not the judgment (or order) itself. *Wagner vs. United States,* 316 F. 2d 871 (2d CA 1963). To hold otherwise would vitiate the purpose of Rule 73(a) Federal Rules Civil Procedure. Hence, it is argued that 60(b) cannot or should not become a substitute for an appeal.

In the instant case, the Court of Appeals found "uncontradicted" evidence including an affidavit by the attorney that the attorney did not have authority to act (Appendix p. 22 *infra*). The affidavit was not admitted into evidence by the District Court after objection to its introduction (R. 192a-193a). Hence, the attorney himself was called to testify and he testified that the recommendations made to the Court on December 22, 1964, were made in good faith (R. 220a); that petitioner's rights had been

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[9] Public policy demands there be an end to litigation. *Bratnober v. Illinois Farm Supply Co.,* 169 F. S. 85. The paucity of the evidence presented by respondent when applying 60(b) (1) FRCP is evident by a perusal of the transcript. (R. 184a-240a.)

violated (R. 210a) and that after he (the attorney) heard the testimony he could not offset, having no testimony at all with which to contradict, and that he was without means to "overcome" it (R. 211a) he decided that further trial would be without merit. The lawyer went on to testify that there were no special instructions on Habeas Corpus cases (R. 202a) and the Attorney General of Ohio testified that the instructions were to oppose all cases (R. 194a) stating further that he did not think that to be a "fair" instruction (R. 194a).

Hence, the Sixth Circuit comes in conflict with the most recent theory of this Court, *Polites vs. United States,* 364 U. S. 426 (1960). In *Polites,* the petitioner made a choice not to further his appeal. He found later decisions that might have been helpful to him. He applied to the trial court and invoked 60(b)(5)(6) and the lower court denied his motion on the grounds that the new decisions did not clearly control the *Polites* case warranting relief from judgment. The lower court held that the doctrine pronounced in *Ackerman vs. United States,* 340 U. S. 193 precluded relief of a judgment under Rule 60(b) where movant has voluntarily abandoned his appeal. The Sixth Circuit affirmed the lower court for the reasons set forth by the lower court.

The majority of this Court, speaking through Justice Potter Stewart, held that in *Polites,* despite the relevant and persuasive force of *Ackerman,* the court need not go so far to decide that when an appeal has been abandoned relief under Rule 60(b) is inflexibly to be withheld when there is a clear and authoritative change in governing law.[10] Hence, it is felt that the court gave weight to the government's contention in *Polites* that *Ackerman* was

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[10] The rationale of this should apply in the instant case.

controlling case law. The government contended that 60(b)(6) could not be a substitute for appeal.

The issues involved herein have implications which go far beyond the interests of this particular Habeas Corpus petitioner. In *Thomas v. Colorado Trust Deed Funds Inc.*, 366 F. 2d 136 (C. A. 10 1966), it was pointed out that 60b provides that a party may be relieved from final judgment or order for any reason *justifying such relief*. The 10th Circuit went on to hold that invoking 60b is an address to the sound discretion of the trial court and must be *clearly substantiated* by *adequate proof*.

In *Thomas* the Court said that an attorney may not settle or consent to a final disposition of his client's case without express authority. However an attorney of record is presumed to have such authority and a judgment entered upon by agreement with the attorney of record will be set aside only upon affirmative proof by the party seeking to vacate the judgment that the attorney had no right to consent to its entry.

Rule 60b was meant to be construed liberally once the grounds for relief are clearly shown. 60b(6) should be employed in "hard cases" where the circumstances generally measure up to one or more of the itemized grounds. *Laguna Royalty Co. v. Marsh*, 350 F. 2d 817 (C. A. Tex. 1965).

CONCLUSION.

This case contains fundamental questions involving the interpretation and application of the Rules of Civil Procedure. The Court below in reversing the district court has so greatly departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision. Although the issue is not directly constitutional, it could well reach constitutional dimensions. This petition should be granted so that an authoritative determination of the questions can be made and the ensuing conflict resolved.

Respectfully submitted,

DAN W. DUFFY,
Attorney for Petitioner.

APPENDIX.

JUDGMENT.

(Filed November 4, 1966.)

APPEAL from the United States District Court for the Southern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby vacated and set aside and the case is remanded for further proceedings in conformity with the opinion.

It is further ordered that Respondent-Appellant recover from Petitioner-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
CARL W. REUSS,
Clerk.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided November 4, 1966.)

Before: O'SULLIVAN and PHILLIPS, Circuit Judges, and CECIL, Senior Circuit Judge.

PER CURIAM. This is an appeal by the State of Ohio on behalf of E. L. Maxwell, Warden, Ohio Penitentiary, respondent-appellant, from an order of the United States District Court, for the Southern District of Ohio, denying

the motion of the respondent to vacate an order granting the petition of Joseph Naples, petitioner-appellee, for a writ of habeas corpus.

The petition was properly filed in the District Court after the petitioner had exhausted his state remedies. (Sections 2241(a)(c)(3) and 2254, Title 28, U.S.C.) At a second hearing on the petition in the District Court, on October 27, 1964, the district judge directed counsel for both parties to file briefs on the questions of whether or not failure to afford the petitioner a preliminary hearing in the Municipal Court of Youngstown, Ohio, denied the petitioner his constitutional right to due process and of what effect a consent to search would have upon the search warrant.

Briefs were accordingly filed and a hearing was had in the court on December 22, 1964. At this hearing counsel appearing for the respondent, an assistant to the Attorney General of Ohio, recommended to the trial judge that the writ be granted on the ground that the petitioner "was deprived of his constitutional right in that due process was not had in the courts at Youngstown, Ohio." Counsel further recommended that in the "interest of justice" the case be remanded to the Municipal Court at Youngstown. These recommendations were contrary to the tenor of counsel's brief which was then before the court.

The district judge said, in response to the recommendations,

> "Well, if the State of Ohio feels that due process has not been followed in this case and that in the interest of justice the writ ought to issue, the Court is inclined to follow the recommendations of the Attorney General of Ohio and the defendant will be remanded for trial, with the proviso that he be placed under a $10,000 bond, that he be tried within 60 days

or be discharged in accordance with the order of this Court."

An order of the court was entered accordingly on December 23, 1964. In this order the district judge remanded the petitioner to the Common Pleas Court of Mahoning County. There was no determination of the petition on the merits.

The petitioner posted bond for $10,000 and was released. A motion was promptly filed on December 28th on behalf of the respondent to vacate the order granting the writ. The motion was filed under Rule 60(b) of the Federal Rules of Civil Procedure. It was claimed that the assistant to the Attorney General was guilty of neglect in that he had no authority to make the recommendation for the petitioner's release. Another part of the motion sought to strike the language of the recommendation from the record.

The assistant who made the recommendation was discharged by the Attorney General. Uncontradicted evidence, including an affidavit and testimony of the assistant, to the effect that the assistant had no authority to make the recommendation was submitted to the court. Subsequently, on August 24, 1965, the district judge denied the motion to vacate the order of December 23, 1964 and this appeal followed. A judge of this Court granted a stay of execution, pending appeal, of that part of the order providing for trial in sixty days.

Upon consideration of the briefs of counsel and upon the record in the case, we conclude that there was neglect of duty on the part of the assistant to the Attorney General, and that this was excusable and could not have been avoided on the part of the Attorney General, the counsel for the respondent. The district judge was in error in

denying the motion to vacate the order granting the petition for a writ of habeas corpus. Because of this neglect and in the interest of justice, under Rule 60(b)(6) of the Federal Rules of Civil Procedure, the order of August 24, 1965, denying the motion to vacate the order of December 23, 1964, is vacated and set aside. The case is remanded to the District Court with instructions to vacate the order of December 23, 1964 and to conduct a hearing for the determination of the petitioner's rights on the petition and the respondent's answer thereto.

STATUTES AND RULES.

1. Statute; Ohio Revised Code:

"1901.02. Territorial jurisdiction.

"The municipal courts, established by section 1901.01 of the Revised Code, have jurisdiction within the corporate limits of their respective municipal corporations and are courts of record * * *."

2. Statute; Ohio Revised Code:

"2933.26 (13430-6). Property seized to be kept by court.

"When a warrant is executed by the seizure of property or things described therein, such property or things shall be kept by the judge, clerk, or magistrate to be used as evidence."

3. Statute; Ohio Revised Code:

"2933.28 (13430-8). Disposition of property after trial.

"If the accused is discharged by the judge or magistrate the property or other things seized under a search warrant shall be returned to the person in whose posses-

sion they were found, unless the possession of such articles is in itself an offense, in which case they shall be destroyed. If the accused is convicted the property shall be returned to its owner, unless the possession of such articles is in itself an offense, in which case they shall be destroyed."

4. Rule 60(b) Federal Rules of Civil Procedure:

"* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

"(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or pro-

ceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S .C., Section 1655 or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended December 27, 1946, and December 29, 1948, effective October 20, 1949."

28 U. S. C. A. Sec. 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

(c) The Writ of habeas corpus shall not extend to a prisoner unless—

* * *

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

28 U. S. C. A. Sec. 2254. State custody; remedies in State Courts.

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of

the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646, 62 Stat. 967.

28 U. S. C. A. Sec. 2111. Harmless error.

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. Added May 24, 1949, c. 139, Sec. 110, 63 Stat. 105.